Nos. 86-179, 86-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, et al.,
Appellants,

v.

CHRISTINE J. AMOS, et al.,
Appellees.

UNITED STATES OF AMERICA,
Appellants,

v.

CHRISTINE J. AMOS, et al.,
Appellees.

On Appeals from the United States District Court for the District of Utah

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BRIEF FOR APPELLANTS IN NO. 86-179

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QUESTIONS PRESENTED

1. Whether Congress acted unconstitutionally when it amended Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, to permit religious employers to hire only members of their own faith, regardless of the nature of the employment activity, in order to make it unnecessary for the EEOC or federal courts to decide whether particular employment activities of religions are "religious" or "secular?"

2. Whether, when an Act of Congress is declared unconstitutional, a court may impose liability and award back pay against an employer who relied in good faith upon the plain language of the statute in setting conditions of employment?

PARTIES

In addition to the parties set forth in the caption, the following are parties to this action:

1. Plaintiffs

Judy Bawden	Arthur Frank Mayson
April Joyce Riding	Ruth Arriola
Deniece Kanon	Shelleen Adamson

Ralph L. Whitaker has no interest in this appeal because the district court determined that he was properly discharged from his employment. No final judgment against Mr. Whitaker has been entered.

2. Defendants

The Corporation of the President of The Church of Jesus Christ of Latter-day Saints*

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* A statement filed in compliance with Rule 28.1 is set forth at page iii of appellants' jurisdictional statement.

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BRIEF FOR APPELLANTS IN NO. 86-179

OPINIONS BELOW

The order and final judgment of the district court (J.S. App. 83a-87a) is unreported. The district court's memorandum decision and order granting in part appellees' motion for summary judgment (J.S. App. 88a-122a) is reported at 618 F. Supp. 1013. The district court's prior memorandum decision and order denying appellants' motion to dismiss (J.S. App. 1a-82a) is reported at 594 F. Supp. 791.

JURISDICTION

The final judgment of the district court was entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure on May 16, 1986. J.S. App. 86a. Notices of Appeal were timely filed in the district court by the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints ("CPB") and the Corporation of the President of The Church of Jesus Christ of Latter-day Saints ("COP") on June 9, 1986 (J.S. App. 130a), and by the United States on June 13, 1986. The CPB and the COP filed their jurisdictional statement on August 5, 1986, and the United States filed its jurisdictional statement on September 11, 1986 (No. 86-401). This Court has jurisdiction of these direct appeals under 28 U.S.C. § 1252. On November 4, 1986, this Court postponed determination of jurisdiction until consideration of the merits of these appeals.[1]

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[1] Under 28 U.S.C. § 1252, this Court has jurisdiction "from an interlocutory or final judgment . . . of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States . . . is a party." *See California* v. *Grace Brethren Church*, 457 U.S. 393, 404 (1982). The district court in this case has declared Section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, unconstitutional as applied to non-religious activities. J.S. App. 70a, 75a, 91a. *See United States* v. *Darusmont*, 449 U.S. 292 (1981). The court has entered a final judgment for appellee Frank Mayson pursuant to Rule 54(b)

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment of the United States Constitution provides, in pertinent part that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides that it shall be unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . .

Section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, as amended, provides:

> This title shall not apply . . . to a religious corporaton, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

STATEMENT

The United States District Court for the District of Utah has invalidated a key provision of Title VII of the Civil Rights Act of 1964 ("Act"). As originally enacted

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of the Federal Rules of Civil Procedure. J.S. App. 86a. Under Rule 54(b), the district court is authorized to enter "final judgment as to one or more but fewer than all of the claims or parties [before it]," and final judgments under Rule 54(b) are ripe for appellate review as authorized by the United States Code. *See Sears, Roebuck and Co.* v. *Mackey*, 351 U.S. 427 (1956). Appeal under 28 U.S.C. § 1252 brings before this Court not merely the constitutional question decided below, but also any other issues finally decided. *See, e.g., United States* v. *Locke*, 105 S. Ct. 1785, 1791 (1985); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975).

in 1964, Section 702 of that Act provided that religious employers may restrict their employment to "individuals of a particular religion to perform work connected with . . . [their] *religious* activities . . ." (emphasis added). In 1972, Congress deleted the word "religious," thereby broadening the exemption to permit religious employers to hire "individuals of a particular religion" (*i.e.*, members of their own faith) with respect to all their activities. The district court declared that the 1972 amendment is "invalid as applied to secular non-religious activities . . ." because it was "a law respecting an establishment of religion" in violation of the First Amendment. J.S. App. 70a, 75a.

1. The Church of Jesus Christ of Latter-day Saints (the "Church"), sometimes called the Mormon or LDS Church, is an unincorporated religious association with membership and activities throughout much of the world. The ecclesiastical leader of the Church on earth is its President, who is recognized by Church members as a prophet and revelator chosen by Jesus Christ.[2] The President and his counselors constitute the First Presidency of the Church.[3] The First Presidency is assisted in administering the affairs of the Church by priesthood quorums and councils and the Presiding Bishopric.[4] The Presiding Bishopric is composed of the Presiding Bishop and two counselors.[5]

Appellants CPB and COP administer certain programs and activities of the Church. Under Utah law, the CPB is a corporation sole which incorporates the office of the Presiding Bishop and which holds title to a number of Church properties. The COP is also a corporation sole

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[2] Aff. of Dallin H. Oaks, Apostle of the Mormon Church, ¶ 3 (R. XIV at 202-03). References to the record will contain the volume number followed by the page number at which a document is located in the record.

[3] *Id.*

[4] *Id.* at ¶ 4.

[5] *Id.*

which incorporates the office of the President of the Church and which is the primary employing entity of the Church. Both the COP and the CPB are treated for federal and state income tax purposes as exempt, non-profit religious entities under Section 501(c)(3) of the Internal Revenue Code. The Church owns or controls some profit-making, tax-paying entities, which are *not* involved in this case and as to which the Church has not sought exemption from state or federal employment regulation.[6]

In its non-profit activities, the Church employs only its members who are eligible for a "temple recommend."[7] That policy arises from several Church beliefs. First, the Church believes that people judge it by the actions and attitudes of its employees. The "fact that an individual is employed by the Church signifies to others that his actions are condoned by the Church."[8] The Church also believes that "[a]ctive members of the Church [*i.e.*, those eligible for temple recommends] better understand and are more effective in carrying out the programs and purposes of the Church." Defendants' Supplemental Answers to Interrogatory Nos. 8 and 10, Plaintiffs' Third Set of Interrogatories (R. XI at 8-10, 16-19). Moreover, salaries paid to Church employees are obtained primarily from contributions from members of the Church donated to support Church activities. *Id.* The Church believes that it should benefit members with employment possibilities in which these contributed funds are expended. *Id.*

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[6] Aff. of Wayne Nelson, ¶ 6 (R. XIV at 199).

[7] The temple recommend is an annually renewed certificate which signifies that its possessor is a member of the Church and is eligible to enter the Church's temples, where certain sacred ceremonies are performed. Aff. of Dallin H. Oaks, ¶¶ 16-18 (R. XIV at 206-07). Because temple recommends are issued only to members who observe Church religious standards (such as regular church attendance, tithing, and abstinence from coffee, tea, alcohol and tobacco) (*id.*), they afford an administratively convenient means of identifying those who qualify for church employment.

[8] Aff. of John Russell Homer, ¶ 4 (R. XIV at 171).

Moreover, employment of the Church's own members is also consistent with the Church's doctrine of individual self-sufficiency. The Church believes that those who are able should work to support themselves rather than receive welfare. In 1936, the President of the Church, Heber J. Grant, stated:

> Our primary purpose was to set up, insofar as it might be possible, a system under which the curse of idleness would be done away with, the evils of a dole abolished, and independence, industry, thrift and self-respect be once more established among our people. The aim of the Church is to help people to help themselves. Work is to be reenthroned as the ruling principle of the lives of our Church membership.[9]

2. The Church activity which was the subject of the district court's final judgment involves Deseret Gymnasium ("Deseret").[10] Deseret is an unincorporated

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[9] Conference Report, October Conference of The Church of Jesus Christ of Latter-day Saints, 1936, p.3, quoted in Aff. of F. Earl Matheson, ¶ 9 (R. XIV at 179-180).

[10] Two other Church activities, Beehive Clothing Mills ("Beehive") and Deseret Industries ("Industries"), were also included in appellees' action. Beehive is an unincorporated, Church-owned, tax-exempt activity subsidized by the Church. Beehive manufactures required religious garments and ceremonial clothing used in the Church's temples. When a Church member makes certain of the covenants that can be entered into only in the temples of the Church, the member must be wearing temple garments and temple clothing. Aff. of Dallin H. Oaks, ¶¶ 12, 13 (R. XIV at 206). The Church regards these items as sacred. *Id.* at ¶ 14. The design, manufacture and distribution of the garments produced by Beehive are under the direct supervision of the leadership of the Church. The claims of those appellees formerly employed at Beehive have not yet been resolved because the district court found that disputed issues of fact precluded a determination on a motion for summary judgment as to whether Beehive is a "religious" or a "secular" activity and that additional discovery was required to resolve that question. J.S. App. 18a-19a, 93a-105a.

Industries is an unincorporated, tax-exempt and subsidized component of the Church's general welfare program. J.S. App. 104a-107a. It hires and trains unemployed, handicapped and retarded

Church-owned, non-profit and subsidized facility governed by a Board appointed by the First Presidency of the Church. J.S. App. 11a-12a. Board members are primarily ecclesiastical officers of the Church. Deseret has neither corporate nor financial existence separate from the COP and holds no bank accounts in its own name.[11] Its employees are hired through the Personnel Department of the Church. *Id.* The property on which Deseret is located is owned by the CPB and is exempt from real estate taxation by the State of Utah on the ground that the premises are used exclusively for religious and charitable purposes under Article 13, Section 2 of the Utah Constitution.[12] The Church, through Deseret, engages in charitable activities by making the facility available at no or at reduced cost to charitable groups and therapy patients.[13]

Deseret was founded to provide Church members with wholesome, church supervised exercise and recreation at facilities where the Church's moral and health standards are observed. The Church believes that one purpose of life on earth is to acquire a body which is the tabernacle of the spirit. *Pearl of Great Price*, Abraham 5:7 (R. XXVI at 42); *New Testament*, 2 Peter 1:13-15 (R. XXVI at 1551-52).[14] The body therefore must be re-

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members of the Church to, *inter alia*, refurbish and sell used items. The court granted summary judgment in favor of the COP and the CPB with respect to the claim of Ralph Whitaker, a former employee of Industries. The court concluded that Industries is a religious activity and thus that appellants may lawfully prefer Church members in employment at Industries. *Id.* at 105a.

[11] Aff. of Leon Heaps, ¶ 4 (R. I at 91).

[12] Aff. of Leon F. Olsen, ¶ 5 (R. I at 95). Those portions of the premises occupied by Deseret that are leased to franchisees which provide certain services to Deseret patrons are not tax exempt. *Id.*

[13] Aff. of Leon Heaps, ¶ 6 (R. I at 92).

[14] Church doctrine rests primarily on four volumes of scripture: a) the *Bible;* b) *The Book of Mormon;* c) *The Doctrine and Covenants;* and d) *The Pearl of Great Price.* Aff. of Dallin H. Oaks ¶ 8 (R. XIV at 204). The Church also recognizes the principle of

spected and cared for during this life. *Doctrine and Covenants*, 89 (R. XXVI at 175-76). At resurrection, the spirit and the body are to be reunited into a tangible body of flesh and bones, which constitutes the human soul. *Doctrine and Covenants*, 88: 14-15 (R. XXVI at 166).[15] Thus the human body acquired in this life has eternal spiritual significance.

The religious purpose of Deseret is reflected in the dedicatory prayer offered at the opening of the facility in 1910 (J.S. App. 13a-14a):

> "Our Father in Heaven, we are assembled for the purpose of dedicating . . . Deseret Gymnasium, as a place where Thy sons and daughters may come to obtain training and exercise beneficial to their physical condition, that their minds may be kept alert and their bodies fitted to the many duties and responsibilities which may be required of them in their daily occupations. Provision has been made for various kinds of exercise that will be suited to the needs of one and all, that will help to fit them for the various vicissitudes of mortal life. Skilled and faithful teachers will be provided so that all that is done by

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continuing revelation, particularly that Jesus Christ continues to reveal important matters pertaining to the doctrines, organization and administration of the Church. *Id.* at ¶ 9. Pronouncements in the nature of revelation given by the President of the Church become Church doctrine of significance equal to that of written scripture. *Id.* The President of the Church, as the designated spokesman of Jesus Christ on the earth, is the final interpreter of Church doctrine, both in interpretation of existing doctrine and in the introduction of new doctrine resulting from continuing revelation. *Id.* The content of revelations and other statements of policy and doctrine are issued from time to time by the First Presidency as public announcements, letters or other statements. *Id.*

[15] *See* B. McConkie, *Mormon Doctrine*, 750 (2d Ed. 1966):

> We had spirit bodies in pre-existence; these bodies are now housed temporarily in mortal tabernacles; during the period between death and the resurrection we will continue to live as spirits; and finally spirit and body will be inseparably connected in the resurrection to form immortal or spiritual bodies.

way of activity will be conducted under proper direction and in keeping with the laws of physical health. Lessons in relation to the care of the body will be provided for all.

Moreover the day will begin with humble prayer and it is the intention that whatever is done by way of exercise . . . will be done in the spirit of prayer and obedience to Thy commandments.

• • •

[M]ay all who assemble here, and who come for the benefit of their health, and for physical blessings, feel that they are in a house dedicated to the Lord.

• • •

[M]oreover we pray that all who come may feel that the Spirit of the Lord is here, whether it be in athletic fields or in the gatherings which will come for religious purposes.[16]

3. Appellee Frank Mayson was employed at Deseret as a building engineer responsible for maintaining the facilities and supervising fourteen custodians and parking lot attendants. J.S. App. 17a. During a personnel

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[16] The religious purpose of Deseret was also described in an official publication of the Church at the time the facility first opened in 1910.

> The opening for physical examination and membership, September 1, of the Deseret Gymnasium marks a *new epoch in the progress of Church work*. The Church has always encouraged manly sports and legitimate enjoyments. It is a part of its *creed* that the most efficient Latter-day Saint is the one who is well balanced mentally, morally, and *physically*. In the city the chances for proper physical training are small. . . . *Hence, the authorities deemed it necessary to provide some means of securing for the young people a place where they could get this physical training, and that under the direction of our own people.* At the same time they thought to provide a means of legitimate enjoyment to the young people by encouraging athletic games and contests. (Emphasis added.)

The Improvement Era, Vol. 13, 1048 (Sept. 1910), quoted in Supplemental Answer to Interrogatory No. 15, Plaintiffs' Third Set of Interrogatories (R. XI at 26-28).

review in 1980, Mr. Mayson, who had not maintained eligibility for a temple recommend, was offered a period of time to regain eligibility. Alternatively, he was offered early retirement if he were unwilling to meet church standards. Second Amended Complaint ¶¶ 36, 38 (R. III at 117-18). Mr. Mayson declined both options, and thus was discharged on April 10, 1981. J.S. App. 3a-4a, 17a, 119a.

4. Mr. Mayson and four other individuals, who were terminated from jobs at Beehive because they did not maintain eligibility for a temple recommend, filed suit against the CPB and the COP in the United States District Court for the District of Utah on April 4, 1983. Plaintiffs claimed that their discharges for failure to qualify for a temple recommend constituted employment discrimination on the basis of religion in violation of Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and a parallel provision of Utah law, Utah Code Ann. § 34-35-6(1).

The CPB and the COP moved to dismiss the complaint, relying on the exemption for religious institutions contained in Section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1. In a decision issued January 11, 1984, the district court concluded that, as amended in 1972, Section 702 applies to *all* church employment, religious and non-religious (J.S. App. 25a). But, applying the three part test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the district court held that the 1972 amendment was an unconstitutional establishment of religion because, as applied to employment in "non-religious" activities, the exemption had the "effect" of advancing religion. J.S. App. 20a-75a.[17]

The district court then developed its own three-part test for determining whether an activity conducted by a religious organization is "religious" or "secular." J.S.

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[17] The court indicated that its "determination regarding [Section 702] applies with equal force to the [parallel] state [law] exemption as it relates to the facts of this case." J.S. App. 8a.

App. 10a-11a. First, the court evaluated the tie between the religious organization and the activity at issue with regard to areas such as financial affairs, day-to-day operations and management. J.S. App. 10a. Second, the court held that "whether or not there is a close and substantial tie between the [religious organization and the activity at issue], the court must examine the nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization or matters of church administration." J.A. App. 10a. Third, the court held that where "the nexus between the primary function of the activity in question and the religious tenets or rituals of the religious organization or matters of church administration is tenuous or non-existent, the court must engage in a third inquiry. It must consider the relationship between the nature of the job the employee is performing and the religious rituals or tenets of the religious organization or matters of church administration." J.S. App. 11a. Applying this new test, the court concluded that Deseret is not a religious activity of the Church.[18]

Appellees then amended their complaint to add a new plaintiff who had been employed at Industries. They

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[18] In declining to dismiss the claims of former Beehive employees, the district court stated:

> Among other areas, the court thinks that plaintiffs are entitled to conduct discovery in the following areas: (1) the manufacturing of garments prior to 1960 and any subsequent changes; (2) the distribution of garments prior to 1960 and any subsequent changes; (3) the tax exempt status of Beehive; (4) the past and current employees who were or are non-members of the Mormon Church; (5) Beehive's contracts, both past and current, with private commercial enterprises for the production of garments; and (6) current hiring practices of the defendants' garment and temple clothing manufacturing plants in Mexico and England. Until those areas and others have been fully developed, the court cannot rule on whether this case, as it relates to Beehive, involves religious activities.

J.S. 18a-19a.

conducted extensive discovery into the organization and beliefs of the Church and the Church's operations of Deseret, Beehive and Industries. Thus, for example, appellees filed interrogatories asking:

> —For a complete description of the worldwide organization of the Church including details of each division, subsidiary, or affiliates' organization and operations since January 1980.
>
> —For detailed job descriptions and religious affiliation data of each and every worker in every division, subsidiary or affiliate of the Church, worldwide including religious qualifications and details thereof for each job.
>
> —For the name of every person who had applied for or was dismissed from any such position in the Church for a period of over three years and the details of all hiring and dismissal decisions.
>
> —For extensive information regarding domestic and worldwide production of garments at any time, including organizational, operational, financial and personnel data.

First Set of Interrogatories, Nos. 2-6, 11-17 (R. III at 172; 175-79, 184-89).[19]

On September 18, 1985, acting on the appellees' motion for summary judgment, the district court reaffirmed its holding that Section 702 is unconstitutional as applied to "secular" activities. J.S. App. 116a. The district court awarded back wages, fringe benefits, retirement contributions and reinstatement to Mr. Mayson. *Id.* at 116a-120a. The district court denied summary judgment with respect to Beehive, stating that it needed further information about any past hiring of non-members or ineligible members at Beehive and about the Church's foreign garment manufacture and supply. *Id.* at 101a-105a. The district court, however, granted summary

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[19] Prior to production of information responsive to the foregoing requests, appellees "limited" their demands to information concerning Deseret, Beehive and Industries.

judgment for appellants with regard to Industries, which it concluded was sufficiently "religious" to pass the court's test for a religious activity. *Id.* at 116a. On May 16, 1986, after the United States had intervened pursuant to 28 U.S.C. § 2403, in order to defend the constitutionality of Section 702, the district court entered an order and judgment reaffirming its earlier decisions and granting a separate final judgment for Mr. Mayson under Rule 54(b). J.S. App. 83a-87a.

SUMMARY OF ARGUMENT

I.

This case involves a special, discrete class of Establishment Clause issues: the validity of an express governmental exemption relieving religious institutions from certain general obligations of law. In 1972, Congress amended Section 702 of Title VII of the Civil Rights Act of 1964 to exempt all religious preference hiring by religious institutions from the prohibition against employment discrimination based on religion. Thus, Congress made a conscientious effort, based on eight years of experience, to resolve the serious constitutional problems that otherwise would have existed because of Congress' own legislation. In so doing, Congress explicitly sought *both* to promote Free Exercise Clause values of religious autonomy *and* to avoid Establishment Clause problems of excessive government entanglement with religion. Congress concluded that the 1964 version of Section 702, which required the Equal Employment Opportunities Commission ("EEOC") and the courts to draw a line between exempted "religious" activities and non-exempted "secular" activities of religious institutions, was constitutionally untenable. Accordingly, Congress allowed religious institutions to engage in religious preference hiring across the whole range of their activities, just as they had been allowed to do for the first 175 years of our nation's history.

Congress' solution to the very real problems it faced falls well within the permissible scope of its constitu-

tional authority to make law. The district court's holding that Congress lacked this power is wrong for three reasons.

A. Congress acted within its constitutional bounds in 1972 because it secured rights guranteed by the Free Exercise Clause. As applied in this case, the district court's three-part test for determining whether an activity is religious violates appellants' free exercise rights. The court improperly ignored appellants' claims that religious preference hiring in this case served religious purposes which are based on and are consistent with religious tenets of the Mormon Church. See *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Kedroff* v. *Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1972). The court also authorized extensive governmental interference with, and surveillance of, Church activities which infringe appellants' right to autonomy protected by the Free Exercise Clause. See *NLRB* v. *Catholic Bishop*, 440 U.S.C. 492 (1979). No compelling governmental interest justifies these court-imposed infringements because Congress itself decided to exempt religious preference hiring from the prohibition against discrimination based on religion. The district court lacked any authority to create its own governmental interest which was not legislated by Congress. Because the conduct subject to the district court's final judgment is protected by the Free Exercise Clause, it cannot be an establishment of religion. Thus the validity of Section 702 under the Establishment Clause is not drawn into question in this case. See *Zorach* v. *Clausen*, 343 U.S. 306 (1952); *Walz* v. *Tax Commission*, 397 U.S. 664 (1970).

B. Section 702's general exemption for religious preference hiring is constitutional under the Establishment Clause analysis of this Court's leading express exemption cases—*Walz* v. *Tax Commission*, 397 U.S. 664 (1970), and *Gillette* v. *United States*, 401 U.S. 437 (1971). This Court made clear in *Walz* that the limits of permissible state accommodation of religion are by no means co-extensive with the non-interference mandate of the Free Exercise Clause.

This Court also recognized in *Walz* and *Gillette* that rigid application of an "effects" test is not appropriate when evaluating the constitutionality of an express exemption under the Establishment Clause because either exemption or non-exemption will have the effect of advancing or inhibiting religion. Thus, the district court erred because *Walz* and *Gillette*, not *Lemon* v. *Kurtzman*, *supra*, provide the appropriate framework for evaluating Section 702. Under *Walz* and *Gillette*, courts should inquire, first, whether the government acted with a legitimate, secular purpose and, second, whether the exemption at issue involves less governmental entanglement with religion than the alternatives to that exemption. Under this approach, Section 702 is clearly constitutional. It was enacted with the legitimate, secular purpose of promoting free exercise values and avoiding Establishment Clause problems. Moreover, it is demonstrably less entangling than the district court's elaborate three part test for distinguishing the "religious" activities of a religious institution from its "secular" activities.

C. Even if *Lemon* provides the applicable Establishment Clause standard of review, the district court misapplied the "primary" effects test and therefore incorrectly declared Section 702 unconstitutional. Section 702 authorizes *no* active cooperation between the government and religion, provides *no* subsidy to church activities and makes *no* effort to coerce religious beliefs. Its primary effect is to protect the autonomy of religious doctrines and church functions, which is not impermissible under *Lemon*. Alternatively, the district court erred by focusing only on whether the exemption, in and of itself, "advances" religion and ignoring whether a more limited exemption "hinders" religion within the meaning of *Lemon*. Under a more discerning "effects" analysis appropriate to cases involving express exemptions, any limited effect in advancing religion that Section 702 has is clearly outweighed by the district court's approach which significantly hinders religion. Thus, on balance, Section 702 does not have an impermissible effect and is therefore constitutional.

II.

Even if Section 702 is unconstitutional, the district court erred in imposing liability and awarding back pay when appellants reasonably relied upon the clear language of Section 702 in making their employment decisions. Denial of back pay in this case is supported by 42 U.S.C. § 2000e-12(b), which immunizes employers who rely upon EEOC opinions even if they are later determined to be unlawful. Congress thus clearly evinced an intent to protect good faith actions such as appellants'. Moreover, denial of back pay is supported by this Court's decisions holding that retroactive relief is inappropriate under Title VII if it would unduly upset settled expectations of employers. See, *e.g.*, *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U.S. 1073 (1983).

ARGUMENT

I. CONGRESS' DECISION TO EXEMPT RELIGIOUS INSTITUTIONS FROM TITLE VII's PROHIBITION AGAINST RELIGION-BASED DISCRIMINATION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

In deciding how a prohibition against employment discrimination based on religion should be applied to religious preference hiring[20] by religious institutions,[21] Congress had three broad alternatives from which to choose:

(1) It could prohibit all religious preference hiring by religious institutions;

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[20] Throughout this brief, the phrase "religious preference hiring" will be used as shorthand for the activity expressly exempted by Section 702 as amended: "the employment of individuals of a particular religion to perform work connected with the carrying on by [a religious institution] of its activities."

[21] The actual language of Section 702 exempts a "religious corporation, association, educational institution or society." Throughout this brief, the phrase "religious institutions" will refer to the various types of religious entities exempted by Section 702.

(2) It could prohibit all religious preference hiring by religious institutions with respect to "secular" activities and exempt all religious preference hiring by religious institutions with respect to "relgious" activities, as it did in the 1964 version of Section 702; or

(3) It could exempt all religious preference hiring by religious institutions, as it did in the 1972 Amendment of Section 702, thus returning to the state of federal law as it had existed prior to the passage of the Civil Rights Act of 1964.[22]

The real thrust of appellees' complaint is that the line drawn by Congress in amending Section 702 in 1972 was underinclusive because Congress did not go as far as it might have in prohibiting religious preference hiring by religious institutions. Congress simply determined that the line it had attempted to draw in 1964 between "religious" and "secular" activities of religious institutions was constitutionally untenable. See pp. 26-29, *infra*.[23] Accordingly, it decided to return to the status quo ante, which had existed for the first 175 years of this nation, by allowing religious institutions to engage in religious preference hiring across the whole range of their activities. Thus, appellees, and other parties like them, were in no different position in 1972 after Section 702 was amended than they were before Title VII was enacted. While this brief will demonstrate that Section

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[22] Title VII also prohibits religious (and other) institutions and employers from discriminating in employment on the basis of race, color, sex or national origin. None of these other prohibitions against employment discrimination is at issue in this case.

[23] The House version of the 1964 Civil Rights Act contained a blanket exemption for all hiring by religious institutions based on the "particular religion" of an individual. *Legislative History of Titles VII and XI of the Civil Rights Act of 1964* at 3004 ["1964 History"]. The Senate substitute inserted the limitation of the exemption to the "religious activities" of religious institutions. *Id.* at 3004. Senators Humphrey and Dirksen noted the change, but did not explain why it had occurred or what considerations motivated it. *Id.* at 3004, 3017.

702 as amended is constitutional under the Religion Clauses of the First Amendment, it is worth noting at the outset that appellees' claim of underinclusiveness—that Congress did not go as far as appellees would like in defining the scope of Title VII—may also be seen as a equal protection issue.[24] And Congress' choice in 1972 clearly satisfies the constitutional requirements of the Equal Protection Clause as applied to the Federal government. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). See note 40, *infra*.

A. Congress' Exemption In Title VII As Applied In This Case Secures Rights Protected Under The Free Exercise Clause And Is Therefore Constitutional.

1. At issue in this case is Congress' discretion to alleviate serious free exercise concerns that would otherwise exist because of Congress' own legislation, without running afoul of the prohibition against establishing religion. In *Wallace* v. *Jaffree*, 105 S. Ct. 2479, 2504 (1985) (concurring opinion), Justice O'Connor succinctly described the accommodation problem presented here as follows: "[t]he challenge posed by [religious accommodation] is how to define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion."

One bedrock principle for solving this problem is that government clearly can legislatively authorize any conduct which the Free Exercise Clause would compel the

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[24] In *Crawford* v. *Board of Educ. of City of Los Angeles*, 458 U.S. 527 (1982), this Court held that the Constitution is not violated when a state first requires mandatory busing to achieve racial balance in the public schools—though under no federal constitutional obligation to do so—and then later rescinds that obligation through amendment to its state constitution. Here, as in *Crawford*, the Constitution, under either an Equal Protection or Religion Clause analysis, does not preclude the appropriate governmental policymakers from exercising less than the total measure of anti-discrimination authority arguably available to them or from establishing an initial threshold of anti-discrimination protection and then receding from that threshold in order to avoid governmental interference with religion.

government to leave unregulated. *Zorach* v. *Clauson*, 343 U.S. 306, 312-314 (1952); *Walz* v. *Tax Commission*, 397 U.S. 664, 673 (1970). Thus, government respect for free exercise *rights* cannot constitute an establishment of religion. See *Quick Bear* v. *Leupp*, 210 U.S. 50, 82 (1908); *School District of Abingdon Township* v. *Schempp*, 374 U.S. 203, 296-297 (Brennan, J., concurring) (1963); *Sherbert* v. *Verner*, 374 U.S. 398, 415-416 (1963) (Stewart, J., concurring). Accordingly, a narrow basis for reversing the judgment below is to hold that the Free Exercise Clause protects the conduct of the Church which was interfered with by the district court's final judgment. In that event, the constitutionality of Section 702 under the Establishment Clause is not drawn into question.

The district court held that its application of Title VII did not infringe appellants' free exercise rights because "[p]reventing religious discrimination . . . can have no significant impact on the exercise of 'any sincerely held religious belief' of the Mormon Church." J.S. App. 54a, quoting *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277, 286 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982). But this conclusion is premised on an unduly expansive interpretation of the district court's authority to interpret religious doctrine and an unduly narrow interpretation of the Free Exercise Clause's protection of religious beliefs and of the Church as an institution.

2. The basic inquiry under the Free Exercise Clause is straightforward—the Court must decide whether the fundamental right has been infringed or burdened and, if so, whether there is a compelling governmental interest that justifies the infringement. *United States* v. *Lee*, 455 U.S. 252, 257 (1982); *Thomas* v. *Review Board*, 450 U.S. 707, 717-718 (1981). In this case the district court has substituted its judgment for that of the Church in deciding whether the Church's practices concerning employment generally, and the operation of Deseret in particular, "substantially" serve the Church's religious objectives.

The Church's employment policies stem from its belief that active members—those eligble for temple recommends—better understand and are more effective in carrying out the programs and purposes of the Church. See p. 4, *supra*. Employment of the Church's own members is also consistent with the Church's doctrine of individual self-sufficiency. In addition, some of the money used to pay the salaries of employees comes directly from contributions by members of the Mormon Church. In spite of church policy, the district court has ordered the church to use its monies to pay salaries of those who do not meet its standards. See p. 11, *supra*. With respect to Deseret itself, the activities pursued there are consistent with basic Mormon principles concerning the eternal significance of the human body. See pp. 5-8, *supra*.

The district court simply ignored the uncontradicted evidence which demonstrated that valid religious beliefs are served directly by the Church's religious preference hiring. In applying its contrived three-part test for determining which activities of the Church are "religious" or "secular," the court substituted itself for the Church. This was manifestly inconsistent with this Court's decisions interpreting the Free Exercise Clause which make clear that the activities of the Church based on the tenets of Mormon faith cannot be set aside or ignored by a secular court. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972); *Jones* v. *Wolf*, 443 U.S. 515, 605 (1979). Matters of faith and doctrine are committed to the exclusive control of the church and, absent evidence of sham or insincerity, are entitled to absolute respect by the courts. This Court has stated plainly that under the Free Exercise Clause "[c]ourts are not arbiters of scriptural interpretation." *Thomas* v. *Review Board*, 450 U.S. at 716. It is therefore inappropriate for a court to require religious institutions to "be put to the proof of their religious doctrines or beliefs." *United States* v. *Ballard*, 322 U.S. 78, 86 (1944).

In other cases, which often involve competing claims of religious organizations to church property, this Court

has adopted clear rules of deference to the church's own decisions about church doctrine and the allocation of church authority. See *Kedroff* v. *Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 100, 107-108, 115-116, 119-121 (1952). As the Court held in *Kedroff*, the First Amendment embodies "a spirit of freedom of religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Accord *Jones* v. *Wolf*, 443 U.S. at 605; *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 721-722 (1976).

There is no question that the religious doctrines of the Mormon Church which were undermined by the district court's opinion are genuinely held, and that the practices are consistent with the Church's religious beliefs. Therefore, it was absolutely beyond the province of the district court to pass judgment upon whether they were sufficiently "religious." By so doing, the Court infringed appellants' First Amendment rights.[25]

The district court through its application of its three-part test in this case has infringed not only the Church's right to decide how to operate in conformity with church doctrine, but also upon its right, protected under the Free Exercise Clause, to operate free of undue government interference and surveillance. The detailed, burdensome discovery requests—some initiated by appellees and some by the district court *sua sponte*, J.S. App. 18a-19a, 93a-105a—permits unseemly, governmentally-authorized

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[25] The district court erred in disregarding these principles on the basis of cases such as *Southwestern Baptist Theological Seminary*, *supra*, which involved claims of *racial* discrimination. The courts in those cases found that nothing in the religious tenets authorized racial discrimination. But it cannot be disputed that the Mormon church does have an institutional, religious preference for employing its own members. Interference with that preference constitutes an infringement of the Church's right of free exercise.

surveillance and scrutiny of Mormon Church beliefs and practices by private plaintiffs, and perhaps, in a subsequent case even by the EEOC itself. This is plainly the type of "invasion . . . by civil authority" which the First Amendment was adopted to protect against. *School District of Abingdon Township* v. *Schempp*, 374 U.S. at 222. This judicially-authorized, on-going surveillance of religious institutions as part of the processes of litigation is directly analogous to the surveillance which has concerned this Court in other contexts. See, *e.g.*, *Lemon* v. *Kurtzman*, 403 U.S. 602, 615-620 (1971); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. at 501-504.[26]

The district court's application of Title VII thus clearly intrude upon the free exercise rights of religious institutions and their need to operate free of excessive governmental interference. See, *e.g.*, *Kedroff*, *supra*, 344 U.S. at 107-108; *Jones* v. *Wolf*, 443 U.S. 595, 602 (1979); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449-51 (1969); *Maryland & Va. Eldership of the Churches of God*, 396 U.S. 367, 368-70 (1970) (Brennan, J., concurring). One commentator has argued correctly that these cases recognize an essential "right of autonomy" under the Free Exercise Clause which "logically extends to all aspects of church operations." Laycock, *Towards a General Theory of the Religion Clauses: The Case of*

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[26] Claims involving excessive entanglement of church and state often are analyzed under the Establishment Clause. *See* pp. 29-34, *infra*. *See also Lemon* v. *Kurtzman*, 403 U.S. at 612-613; *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 105 S. Ct. 1953, 1963-1964 (1985). But, entanglement is not an issue relevant only to Establishment Clause claims. Governmental regulation or surveillance can interfere with the free exercise of religion as the Court recognized in *Kedroff*, 344 U.S. 94, 100, 107-108, 115-116, 119-121 and in *Catholic Bishop*, 440 U.S. at 501-504. The fact that the two Clauses operate in harmony on the issue of entanglement—*i.e.*, both evince a clear preference for non-entanglement—provides a compelling argument for analyzing express exemption cases on the basis of which alternative express exemption involves the least amount of governmental entanglement or interference with religion. *See* pp. 29-38, *infra*.

Church Labor Relations and the Right to Church Autonomy, 81 Column. L. Rev. 1373, 1397 (1981). To force the Church's otherwise autonomous operations to be scrutinized in the fashion authorized by the district court thus infringes appellants' free exercise rights as defined by this Court.

3. Of course, not every infringement of the free exercise of religion violates the Constitution. The question remains whether the government can properly assert a compelling interest to justify the infringement and show that the infringing action was carefully tailored to that governmental interest. See, *e.g.*, *Thomas* v. *Review Board*, 450 U.S. at 717-718. It is in this regard that the district court committed its most glaring error.

The district court justified its intrusion into appellants' religious practices on the basis that "an exemption from Title VII for discrimination in secular, non-religious activities would seriously undermine *Congress'* attempt to eliminate discrimination." J.S. App. 57a (emphasis added). The district court's compelling interest analysis thus treats the issue as if Congress itself had limited the religious exemption in Title VII to "religious" activities and that appellants are challenging the limitation as a violation of the Free Exercise Clause. In that event, the court quite reasonably would examine the importance of Congress' desire to eliminate employment discrimination based on religion, just as the lower courts have done in race and sex discrimination cases. But what the district court's analysis simply ignores is that Congress has made *its own* judgment that the public interest will be better served by allowing religious preference hiring by religious institutions in all their activities. That was why it amended Section 702 in 1972. The district court had no basis in precedent or logic for creating a compelling interest to eliminate religious discrimination where the Congress itself had found none. As one commentator has correctly explained:

> The 'compelling state interest' element of the free exercise test is for the protection of the government

> defendant; it is in the nature of an affirmative defense. If the government does not choose to invoke it, no other party has cause to complain.[27]

Accordingly, the district court erred in holding that its blatant infringement of appellants' free exercise rights could be justified by any governmental interest the court itself might concoct. Once it is established that the district court's application of Title VII violates the Free Exercise Clause, it then becomes clear that Congress' attempt in Section 702 to protect free exercise rights cannot be an establishment of religion as applied in this case.

B. Under This Court's Decisions in *Walz* v. *Tax Commission* and *Gillette* v. *United States*, Section 702 Is A Permissible Accommodation Of Religious Activities Which Minimizes Governmental Entanglements And Therefore Does Not Offend The Establishment Clause.

Alternatively, Section 702's exemption for religious preference hiring is constitutional under the proper Establishment Clause analysis. This Court has made clear that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." [28] The decisions of this Court recognize that "the interrelationship of the Religion Clauses has permitted government to take religion into account . . . and to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish." *McDaniel* v. *Paty*,

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[27] McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 31.

[28] *Walz* v. *Tax Commission*, 397 U.S. at 673. See *Gillette* v. *United States*, 401 U.S. 437, 453 (1971); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *Wallace* v. *Jaffree*, 105 S. Ct. at 2504 (O'Connor, J., concurring); *Marsh* v. *Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) (accomodation is constitutional "even when the government is not compelled to do so by the Free Exercise Clause").

435 U.S. 618, 639 (1978) (Brennan, J., concurring) (footnotes omitted). See *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952); *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908).

The issue remains, however, of defining a legitimate area of accommodation, while at the same time ensuring that the Establishment Clause is not eviscerated by legislative efforts to promote religious freedom. The district court rigidly applied the three-part analysis in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), which is most readily utilized to evaluate efforts by the states to provide financial aid or other direct forms of assistance to religion or religious institutions. See, *e.g.*, *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973); *Aguilar* v. *Felton*, 105 S. Ct. 3232 (1985).

The analysis in *Lemon* was not fashioned to deal with the discrete and special category of Establishment Clause issues presented when government has expressly chosen not to provide religion with financial aid or with other direct assistance, but instead to accommodate religious freedom and autonomy by exempting religious institutions from certain obligations of law. In particular, rigid application of *Lemon*'s "effects" test is inappropriate because, as this Court has recognized, the "effect" of such exemptions will, inevitably, be to advance religion—just as the decision not to accord an exemption will, inevitably, inhibit religion. *Walz* v. *Tax Commission*, 397 U.S. at 674-675; *id.* at 692 (Brennan, J., concurring). Thus, while *Lemon* obviously remains an approach this Court has found useful for Establishment Clause issues relating to governmental aid to religion, it is not well-suited to the task of defining the limits of appropriate accommodation in the unique setting of governmentally enacted exemptions.[29]

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[29] This court has recognized that direct governmental benefits to or burdens on religion raise more difficult constitutional questions than express governmental exemptions. *Walz*, *supra*, 397 U.S. at 673, 676 & 690 (Brennan, J., concurring).

Indeed, in mechanically applying *Lemon*'s "effects" test, and in voiding Section 702 simply because it has the "effect" of providing some benefit to all religious institutions, the district court improperly ignored this Court's warning in *Lynch* v. *Donnelly*, 465 U.S. 668, 678 (1984), that in "our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court." This Court has thus emphasized the need for careful, case-by-case analysis (*id.* at 679):

> In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. *Lemon, supra. But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.* [Initial emphasis in original; subsequent emphasis supplied.]

The Court's admonition in *Lynch* echoed this Court's earlier statement that *Lemon*'s three part analysis "provides 'no more than [a] helpful signpos[t]' in dealing with Establishment Clause challenges." *Mueller* v. *Allen*, 463 U.S. 388, 394 (1983), quoting *Hunt* v. *McNair*, 413 734, 741 (1973).[30]

In an Establishment Clause case involving an express attempt by Congress to accommodate free exercise of religion by providing an exemption from general obligations, courts should first determine whether the gov-

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[30] *See also School Dist. of City of Grand Rapids* v. *Ball*, 105 S. Ct. 3216, 3222 (1985) (*Lemon* tests " 'must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired' "), *quoting*, *Meek* v. *Pittenger*, 421 U.S. 349, 359 (1975).

ernment acted with a legitimate, secular purpose. If so, then courts should apply the Establishment Clause analysis of the leading express exemption cases, *Walz* v. *Tax Commission*, and *Gillette* v. *United States*, 401 U.S. 437 (1971), and not examine whether an "effect" of the exemption is to promote or inhibit religion, but rather ask whether the exemption involves less governmental entanglement than the alternatives to that exemption. That analysis will permit accommodation of religion, but only when the exemption promotes both Free Exercise and Establishment Clause values by respecting religious autonomy.

1. Section 702, As Amended in 1972, Has A Valid, Secular Purpose.

The clear objective of the 1972 Amendment to Section 702 was to return the federal law to its pre-1964 state by eliminating governmental involvement in the religious preference hiring of religious institutions across the full range of their activities. This conclusion is apparent from the face of the amended Section 702 itself; the limiting word "religious" was deleted, thus exempting religious preference hiring with respect to all "activities" of religious institutions.[31]

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[31] The 1972 amendment to Section 702 had its origins in a Senate bill, and two sponsors of the amendment, Senators Allen and Ervin, and its main opponent, Senator Williams, clearly indicated that the objective of the amendment was to delete the word "religious" from the exemption embodied in the 1964 version of Section 702 in order to remove government involvement in all religious preference hiring. See, *e.g.*, *Legislative History of the Equal Employment Opportunity Act of 1972*, Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92nd Cong., 2d Sess. 843-845 (1972) (hereafter "Legislative History") (remarks of Sen. Allen), 1645 (remarks of Sen. Ervin), 1665 (remarks of Sen. Williams). The conference committee accepted the Senate Amendment and explained that it expanded the exemption for religious organizations "in all their activities instead of the present limitation to religious activities." *Id.* at 1814. See also *id.* at 1858-1859 (Statement of Rep. Erlenborn).

The rationale for the 1972 amendment of Section 702 was demonstrably secular. As even the district court recognized, the sponsors of the amendment, especially Senator Ervin, made clear that the sole reason for the amendment was to comply with *both* the Religion Clauses of the First Amendment. First, Senator Ervin was deeply and correctly concerned that the 1964 exemption impaired the free exercise of religion. Senator Ervin explained, "this amendment is to take the political hands of Caesar off of the institutions of God, where they have no place to be." Legislative History at 1645. As he further stated with respect to a similar but broader amendment [32]:

> I cannot understand why the EEOC [Equal Employment Opportunities Commission] or those who support it are so anxious to extend its powers so that it will have jurisdiction over who is employed by a church to be a janitor, or who is employed to be a secretary for a church, or who is employed—as is done in many instances where religious organizations have fundraising drives—to raise money for them.

Legislative History at 1223.

A second purpose of the amendment was to avoid the entanglement between church and state forbidden by both the Free Exercise and Establishment Clauses by taking government out of the business of drawing the line between "secular" and "religious" activities in order to regulate the former under, and exempt the latter from, Title VII's prohibition against religion-based discrimination. During the debate on his broad amendment, which excluded religious institutions from any of Title VII's strictures, Senator Ervin stated with respect to the 1964 version of Section 702:

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[32] Before advancing the amendment to Section 702 which was ultimately enacted, Senator Ervin urged enactment of an amendment which would have exempted religious institutions from all the prohibitions of Title VII. Although this broader amendment did not become law, the concerns which motivated Senator Ervin were clearly the same with respect to both the broader amendment and the amended version of Section 702 which was ultimately enacted. J.S. App. 35a.

> Mr. President, as I construe those words, they attempt to do an impossible thing, that is, to separate the religious activities of a religious corporation, association, educational institution, or society, from those of its activities which can be said to be not religious, nonreligious, or unreligious.

Legislative History at 1211. Senator Ervin also said:

> . . . [T]he clause against the establishment of religion by law was intended to erect a wall of separation between church and state. I respectfully submit that we do not erect a wall of separation between church and state when we permit the agents of the state to tell . . . [a religious institution] whom it is to employ for any purpose, or whom it is to promote for any purpose, or whom it may discharge for any reason.

Id. at 1221.

In sum, it is clear that Congress' intent in amending Section 702 was to remove government from religious preference hiring decisions by religious institutions in order to promote constitutional values and to avoid constitutional problems. This is clearly a valid secular purpose. See *Wallace* v. *Jaffree*, 105 S.Ct. at 2490; *id.* at 2494-2495 (Powell, J., concurring), *id.* at 2501 (O'Connor, J., concurring). In so doing, the Congress did not intend to benefit any particular religion; it sought to preserve the autonomy of all religions and to keep government out of decision-making by religious institutions. It also acted with the express intent of following the commands of *both* of the Constitution's Religion Clauses. Congress thereby promoted religion in a way that directly advances a secular interest in pluralism. See *Walz* v. *Tax Commission*, 397 U.S. at 687, 689 (Brennan, J., concurring); *Bob Jones University* v. *United States*, 461 U.S. 574, 609 (1983) (Powell, J., concurring). Congress' intent was thus valid under the decisions of this Court. *Gillette* v. *United States*, 401 U.S. at 453-54. See also J.S. App. 40a-41a. As the district court noted, there is no evidence that Congress "amended

Section 702 for a religious purpose or to promote religion or religious beliefs". *Id.*

2. The *Walz-Gillette* Analysis of Express Exemptions.

If, as in this case, an express exemption has a valid, secular purpose, this Court has not utilized the three part test in *Lemon*, but, instead, has limited its inquiry to whether the exemption involves less governmental entanglement with religion than the alternatives. Under this approach, Section 702 is clearly constitutional.

a. The leading case involving an Establishment Clause challenge to an express exemption of religion is *Walz* v. *Tax Commission*. In that case, this Court upheld the constitutionality of a New York State constitutional provision, implemented by state statute, that authorized the state tax commission to grant property tax exemptions to property used exclusively for religious, educational or charitable purposes. 397 U.S. at 680. After finding that the purpose of the tax exemption was valid (*id.* at 672), the Court analyzed whether the exemption involved less governmental entanglement with religion than the alternative—no exemption from property taxes for holdings of religious institutions. *Id.* at 674-75. In answering the second question, the Court stated:

> In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. *Id.* at 675.

Accordingly, the key inquiry under *Walz* involves a *comparison of the alternatives on the issue of the relative entanglement of government with religion*. This analysis makes sense in an accommodation case because both the Free Exercise Clause and the Establishment Clause condemn the excessive entanglement of church and state. See pp. 20-22 & n.26, *supra*. In addition, it is difficult to hold that Congress is "sponsoring" religion when its ac-

tion merely effects a more complete separation of church and state.

Although *Walz* was decided before *Lemon*, the Court nonetheless recognized that, in assessing the constitutionality of an exemption under the Establishment Clause, it was not useful to determine whether the exemption, considered in isolation, advanced or inhibited religion. The Court noted that either "course, taxation of churches or exemption, occasions some degree of involvement with religion." *Id.* at 674. As Justice Brennan stated succinctly in his concurring opinion (*id.* at 692), whether "Government grants or withholds the exemptions, it is going to be involved with religion."

In other words, either an exemption, a subsidy or taxation will have a significant inhibiting or advancing effect with respect to religion, and thus a general inquiry into whether the single alternate chosen, in and of itself, excessively inhibits or advances religion would lead to the anomalous result that no alternative was constitutional. Thus, the proper inquiry is whether an exemption involves less entanglement with government than the alternatives. *Id.* at 690-91 (Brennan, J., concurring).[33]

b. The basic approach of *Walz* was followed in *Gillette* v. *United States*, which, unlike *Walz*, involved an exemption that applied *only* to religion (and not to educational or charitable activities). Section 6(j) of the Military Selective Service Act of 1967 exempted from military service in the armed forces a person "who, by reason of religious training and belief, is conscientiously opposed to participation in war *in any form*." 401 U.S. at 441 (emphasis supplied). Petitioners, who sought exemption from military service, claimed that Section 6(j) impermissibly established religion because it exempted

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[33] Although *Walz* does, in one place, mention the need to examine the "effect" of an exemption (*id.* at 669), the analysis employed by the Court shows that the only effect considered relevant was the comparative entanglement of the alternatives. The "effect" of the exemption—in the broad *Lemon* sense of advancing or inhibiting religion—was not an issue analyzed by the Court in *Walz*.

those who opposed participation in *all* wars based on beliefs which were religious in nature but did not exempt those who opposed participation in *particular* wars due to religious beliefs. Just as in *Walz*, this Court recognized that the exemption had the inevitable *effect* of advancing religion—those with religious beliefs opposing all wars as opposed to those with religious beliefs opposing particular wars. As the Court stated (*id.* at 449):

> On the assumption that these petitioners' beliefs concerning war have roots that are "religious" in nature . . . petitioners ask how their claims to relief from military service can be permitted to fail, while other "religious" claims are upheld by the Act. It is a fact that § 6(j), properly construed, has this *effect*. Yet we cannot conclude in mechanical fashion, or at all, that the section works an establishment of religion. [Emphasis supplied.] [34]

Thus, as in *Walz*, a conclusion that the exemption had the effect of advancing religious interests was not dispositive—indeed was not deemed relevant. This Court instead inquired whether the statutory exemption had a secular purpose and rationale and whether the exemption would be more or less entangling than the alternative urged by petitioners. *Id.* at 449, n.14 & 450. Although the Court indicated (but did not hold) that the Free Exercise Clause did not require that Congress exempt conscientious objectors from military service, *id.* at 461, n.23, it had no trouble finding a secular purpose in Congress' evident intent to promote "free exercise values." *Id.* at 453-54.

The Court then concluded that the "petitioners ask for greater 'entanglement' by judicial expansion of the ex-

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[34] The Court did not even pause over the exemption's obvious effect of benefiting certain individuals with religious beliefs, as compared to those without such beliefs, by relieving conscientious objectors of a grave obligation of citizenship—bearing arms for the nation. *Id.* at 450. *See Selective Draft Law Cases*, 245 U.S. 366, 390 (1918).

emption to cover objectors to particular wars." *Id.* at 450. As the Court stated (*id.* at 457-458):

> It does not bespeak an establishing of religion for Congress to forgo the enterprise of distinguishing those whose dissent [to particular wars] has some conscientious basis from those who simply dissent [from the particular war] . . . . [I]t is true that "the more discriminating and complicated the basis of classification for an exemption—even a neutral one—the greater the potential for state involvement" in determining the character of persons' beliefs and affiliations, thus "entangl[ing] government in difficult classifications of what is or is not religious," or what is or is not conscientious. *Walz* v. *Tax Commission*, 397 U.S. at 698-699 (opinion of Harlan, J.).[35]

The greater potential for entanglement raised by petitioners' claim to an exemption for particular wars, as compared to the statutory exemption for conscientious objection to all wars, was thus a dispositive consideration in upholding Section 6(j) against the Establishment Clause challenge.

c. The *Walz-Gillette* approach to express exemptions was recently followed by this Court in *Bob Jones University* v. *United States*, 461 U.S. 574 (1983). Bob Jones University contended that the denial of tax exemption to private schools with racially discriminatory admissions policies violated the Establishment Clause by preferring religions which do not require racial discrimination over

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[35] The Court in *Gillette* thus found that the more broadly worded exemption decreased the likelihood that the federal statute would be enforced in a discriminatory fashion. 401 U.S. at 457-458. This concern applies equally in this case. Any effort by the courts to define what activities are "religious" and which are not will almost certainly lead to inconsistent decisions. Thus, by requiring such an inquiry, the district court has increased significantly the likelihood that similar activities will be exempt for some religious institutions but not for others. Such a consequence is directly contrary to the purpose of the Religion Clauses. *See Walz* v. *Tax Commission*, 397 U.S. at 698-699 (opinion of Harlan, J.); *Gillette* v. *United States*, 401 U.S. at 457.

those which believe racial intermixing is forbidden. In rejecting this Establishment Clause challenge to the scope of the tax exemption, this Court did not even refer to the *Lemon* test. Nor did it consider the effect of the limited exemption relevant because there could be little doubt that the effect was, in fact, to advance religious institutions with racially non-discriminatory religious beliefs and practices over religious institutions with racially discriminatory beliefs and practices. *Id.* at 603-604 (denial of tax exemption would "inevitably have a substantial impact" on operations of segregated schools). Instead, citing *Gillette* and following the *Walz-Gillette* approach, this Court simply found that the exemption had a secular purpose—the strong national policy favoring elimination of racial discrimination—and that the present exemption avoids the necessity for a *potentially* entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief. 461 U.S. at 604, n.30.

d. Support for the *Walz-Gillette* Establishment Clause analysis of exemptions for religious institutions is also found in this Court's decisions construing statutes to avoid constitutional problems arising from the Religion Clause guarantees. In *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court held that, as a matter of statutory construction, schools operated by a church to teach both religious and secular subjects were outside the jurisdiction of the National Labor Relations Act ("NLRA"). See also *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 788 (1981).

Crucial to the Court's analysis was the determination that there would be a serious risk of infringement of the Religion Clauses of the First Amendment if the Act conferred jurisdiction on the NLRB over church-operated schools. 440 U.S. at 501-504. But, in concluding that non-NLRA coverage (*i.e.*, effective exemption) of church-operated schools would minimize the risk of a constitutional violation, this Court was not concerned that the *effect* of such non-coverage would be to benefit church-operated schools as compared to non-church-operated

schools. As in *Walz* and *Gillette*, therefore, the Court's concern in evaluating whether religious institutions should be exempt from laws of general applicability, was *not* with the *effect* of such an exemption but rather with the comparative degree of entanglement of the alternatives.

3. Section 702 Is Clearly the Least Entangling Approach Available And Therefore Is Constitutional Under the Establishment Clause Analysis Of *Walz-Gillette*.

As noted above, Congress had three available options for dealing with the religious preference hiring issue. See pp. 15-16, *supra* (describing the three options available to the Congress). One of those—a prohibition on all religious preference hiring by religious institutions—may be summarily eliminated from consideration. Because that option would authorize direct governmental regulation of religious preference hiring for core religious activities, such as who shall be members of the ministry or priesthood, it unquestionably would have been both a free exercise violation and an unconstitutional establishment of religion, as even the district court recognized. See J.S. App. at 48a-49a. See also *McClure* v. *Salvation Army*, 460 F.2d 553, 558-560 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972); *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929); *McDaniel* v. *Paty*, 453 U.S. 618 (1978).

A comparison of the remaining two alternatives—the complete exemption of Section 702 or the district court's elaborate test for distinguishing between exempt "religious" activities and non-exempt "secular" activities of religious institutions (J.S. App. 10a-11a)—overwhelmingly demonstrates that Section 702 involves far less entanglement of government with religion.

First, the district court's alternative entails extensive and intrusive *investigation* of church doctrines, beliefs, practices and operations as compared with a complete absence of investigation under Section 702. As previously

discussed, see pp. 20-22, *supra*, the district court's test, by making religious doctrines and practices relevant to the proper disposition of a Title VII action, permits governmentally authorized surveillance of religious institutions by private or governmental plaintiffs. Such surveillance can be sustained over a substantial period while litigation proceeds, as this case again illustrates. See *Lemon*, 403 U.S. at 615-620; *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. at 502 ("It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions").[36]

Second, the application of the "religious" test to the "facts found" would also require *an independent administrative or judicial determination of the religious nature of the religious institution's beliefs and practices.* Thus, under the district court's test, the EEOC or a court will inquire whether the relationship "between the primary function of the activity in question and the religious rituals or tenets of the religious organization" is "substantial." J.S. App. 10a. This determination by a secular authority thrusts the EEOC and courts into the "potentially entangling inquiry" about the nature and strength of a religious institution's beliefs. *Bob Jones University* v. *United States*, 461 U.S. at 604-605 n.30; *Gillette* v. *United States*, 401 U.S. at 457 (recognizing the danger in detailed line drawing of "unintended religious discrimination"); *United States* v. *Lee*, 455 U.S. 252, 257 (1982) (judicial deference to religion's view of its own faith).[37] See also, *New York* v. *Cathedral Academy* 434

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[36] *See* the discussion in the Brief *Amicus Curiae* submitted by the General Conference of Seventh-Day Adventists concerning that Church's experience with EEOC investigations into the Church's employment of its own members in its hospitals.

[37] A similar objection applies to the third "prong" of the district court's test: consideration of the "substantiality" of "the relationship between the nature of the job the employee is performing and the religious rituals or tenets of the religious organization . . ." J.S. App. at 11a.

U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment.").

Third, in contrast to an exemption or some indirect method of regulation, the district court's approach would, if liability were established, lead to *direct regulation of the practices of the religious institution* through reinstatement or back pay remedies. Moreover, depending on the nature of the suit, such governmental regulation could not only be direct but also *continuing* if, as is often the case in Title VII suits, the court retained jurisdiction over the action to ensure that the remedy were effected. This continuing jurisdiction of the Court during the remedy stage of a proceeding could create the type of entangling surveillance disapproved by *Lemon* and *Catholic Bishop*. See p. 35, *supra*. These problems of entanglement are also avoided by the Congressionally mandated exemption of Section 702.

Fourth, the uncertainty created by the complex, multifactor test which entangles courts in evaluating the doctrines, beliefs, practices and operations of religious institutions will cause extraordinary uncertainty about whom religious organizations may hire in jobs that those organizations believe are "religious." This overall impact of entanglement will chill religious institutions in the exercise of their constitutional rights because they can be expected to err on the side of caution to avoid the rigors and scrutiny of litigation, not to mention potential liability.

The district court thus erred by not following the analysis mandated by *Walz-Gillette* of comparing the relative entanglement of the alternatives. See J.S. App. 44a-52a. Indeed, the district court, while initially acknowledging the relevance and force of *Gillette*, then proceeded to ignore it. *Id.* at 45a, n.41. Instead, the court summarily (and erroneously) asserted—without any analysis, let alone comparative analysis—that its test did not involve

"excessive" court surveillance of religion, would not require independent court determinations about religious doctrine and would not impermissibly involve the court in matters of church administration. *Id.* at 44a-45a.[38]

The primary reason the district court rejected appellants' claim of general entanglement in denying their motion to dismiss was that the courts of appeals (but not this Court) had, in Title VII actions involving charges of racial or sexual discrimination against religious institutions, asked whether the job was like a "minister's," and thus necessarily exempt from Title VII's prohibition under the Free Exercise Clause. J.S. App. 48a-51a. But the district court's reasoning is seriously flawed. In the sex and race cases, Congress had issued a blanket prohibition against employment discrimination; line drawing to exempt core religious functions from that prohibition was compelled by the Free Exercise Clause, and thus could not constitute impermissible entanglement under the Establishment Clause. But it simply does not follow—when Congress, by contrast, has chosen to exempt religious preference hiring completely from a prohibition against employment discrimination based on religion—that the district court's elaborate test drawing a line between "religious" and "secular" activities, imposed on its own policy initiative, does not constitute impermissible entanglement of government with religion.[39] The district court itself recognized that religious preference hiring by religious institutions is different from sex or race conscious hiring, noting (J.S. App. 51a) that the "area of religious discrimination may be more sensitive than the area of sex or race discrimination because the type of discrimination involved

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[38] These summary conclusions were subsequently contradicted by the district court's own analysis. J.S. App. 72a.

[39] Indeed, the district court acknowledged that the cases it relied upon were primarily Free Exercise challenges to the broad sweep of Title VII's prohibition against race and sex discrimination. J.S. App. 40a and n.35.

is intimately connected with the nature and purpose of religious organizations."

Congress itself ultimately acted on the view that religious discrimination by religious institutions may be "more sensitive" than race or sex discrimination by those groups when it amended Section 702 in 1972 and rejected Senator Ervin's broader amendments which would have exempted religious institutions from Title VII's prohibition against race and sex discrimination. See pp. 26-29, *supra*. Congress sought to remove the EEOC and the Courts from the entangling enterprise of drawing a line between "religious" and "secular" activities. In so doing, it commendably followed an accommodationist approach which promoted both Free Exercise Clause values of religious autonomy and Establishment Clause values of anti-entanglement. The *Walz-Gillette* approach properly permits government to pursue such goals and therefore, under *Walz-Gillette*, Section 702 does not violate the Establishment Clause.[40]

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[40] Because appellees are essentially arguing that Section 702, as amended, is underinclusive, this case might be analyzed under Equal Protection Clause principles applicable to the Federal government rather than under the Religion Clauses. Indeed, members of this Court have, at times, approached cases involving religion using principles from, or analogous to, equal protection analysis. *See, e.g., McDaniel*, 435 U.S. at 643 (White, J., concurring); *Fowler* v. *Rhode Island*, 345 U.S. 67, 70 (1953) (Frankfurter, J., concurring).

Section 702, as amended, is constitutional under heightened Equal Protection scrutiny, which is strikingly similar to the *Walz-Gillette* analysis. Section 702 has a compelling purpose (to promote Free Exercise values while avoiding Establishment Clause problems) and, for the reasons stated above, it is the least restrictive alternative for accomplishing that goal compared to the two other options available to Congress. See pp. 29-34, *supra*. Section 702 is also carefully tailored to the problem of religious preference hiring because Congress rejected Senator Ervin's broader amendment in 1972 that would have exempted religious institutions from Title VII's prohibition against employment discrimination based on race, sex, color or national origin.

C. Even If The *Lemon* Test Is Applied, Section 702 Does Not Violate The Establishment Clause.

Even if Section 702 is evaluated under the standards announced in *Lemon*, it is clear that the provision is permissible under the Establishment Clause. This Court in *Lemon* "gleaned" three tests from the Court's prior cases:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster "an excessive government entanglement with religion."

403 U.S at 612-613 (citations omitted). These "tests" are designed, and should be interpreted, to protect against the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support and active involvement of the sovereign in religious activity.'" *Id.* at 612, quoting, *Walz* v. *Tax Commission*, 397 U.S. at 668.

For reasons discussed above (at pp. 26-28, 34-38), the 1972 amendment to Section 702 plainly passes the first and the third *Lemon* tests. Thus, the only remaining question in applying *Lemon* in this case is whether the "principal or primary effect" of Section 702 is to advance or inhibit religion.

1. The district court inexplicably ignored what it had found to be the secular purpose of the statute in evaluating Section 702's effect, and concluded that the statute had the primary effect of advancing religion. But, the district court was wrong; the "principal or primary effect" of the statute is to eliminate government interference with religious institutions. The instant case involves *no* active cooperation between government and religion, *no* government subsidy to church activities and *no* attempt by the government to coerce religious beliefs. This Court never has found an improper "effect" of advancing religion with so little government action. Section 702 does nothing more than give churches the option

of deciding whether to use religious preferences in hiring. Thus, the primary "effect" on religious organizations resulting from Section 702 is increased autonomy—the ability to manage church affairs without government interference.[41]

Moreover, none of the factors cited by the district court justifies a contrary conclusion. First, in support of its conclusion that Section 702 impermissibly advances religion, the district court noted that the provision contains a facial religious classification that provides a benefit solely to religion, rather than to a broader spectrum of groups. J.S. App. 61a-66a. However, this Court has never held that a governmental action which affects only religion automatically offends the Establishment

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[41] Indeed, this Court has upheld, against Establishment Clause challenges, statutes providing far greater and more direct aid to religion that any "benefit" conferred under Section 702. *See, e.g., Walz, supra* (tax exemptions for religious organizations); *Mueller* v. *Allen*, 463 U.S. 388 (1983) (tax deductions for expenses incurred in sending children to parochial schools); *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736 (1976) (non-categorical grants to church-sponsored colleges and universities); *Hunt* v. *McNair*, 413 U.S. 734 (1973) (state assistance to sectarian colleges through the issuance of revenue bonds); *Board of Education* v. *Allen*, 392 U.S. 236 (1968) (laws requiring that public school districts purchase and loan textbooks to students in parochial schools); *Tilton* v. *Richardson*, 403 U.S. 672 (1971) (state grants to church-related colleges and universities for the construction of academic facilities); *Gillette, supra* (draft exemptions for religious objectors); and *Everson* v. *Board of Education*, 330 U.S. 1 (1947) (reimbursement to parents of children attending religious school for bus fare).

Moreover, this Court has ruled that the Free Exercise Clause *requires* the provision of religious facilities in prisons at state expense, *Cruz* v. *Beto*, 405 U.S. 319 (1972), as well as the religious exceptions to unemployment compensation laws in *Sherbert* v. *Verner, supra*, and *Thomas* v. *Review Board, supra*. In the instant case, Congress simply chose not to regulate certain decisions of religious organizations. In doing so, it did not endorse religion as such, did not endorse any particular faith and took nothing resembling the affirmative steps with regard to religion that this Court *approved* in *Cruz, Sherbert* and *Thomas*.

Clause. To the contrary, this Court upheld an express exemption solely for conscientious religious objectors in *Gillette*, although the Court indicated that the exemption was not required by the Free Exercise Clause. See also *Zorach* v. *Clauson*, 343 U.S. 306 (1952). Quite clearly, if such a facial classification were sufficient to condemn a law, *no* exemption for religious practice would survive—not even an exemption for core religious activity of a church.

Second, the district court erroneously cited the absence of a historical tradition supporting the exemption. J.S. App. 66-67. For the first 175 years of our Nation's history, religious institutions could engage in religious preference hiring without implicating any federal anti-discrimination statute. Moreover, this Court has never held that historical traditions are dispositive of Religion Clause issues. See *McDaniel* v. *Paty*, 435 U.S. at 625 (clear history of discrimination against clergy holding public office not dispositive).

Third, the district court cited the possibility that the 1972 exemption might be used by a church to coerce adherence to its religious beliefs. J.S. 67a-68a, 72a-73a. However, the district court itself recognized that this concern is "purely hypothetical" conceding that "there is no evidence in this case that defendants are using or ever would use section 702 to further [their] beliefs." *Id.* at 73a n. 69. This Court has made clear it will not overturn legislative action on the speculative and unsupported assertion that it may lead to an impermissible result. *Larson* v. *Valente*, 456 U.S. 228, 249 (1982).

2. Even if the Court were to hold that, when evaluated alone, Section 702 has a primary effect of advancing religion, it still should not conclude on that basis that the provision is unconstitutional. In a case such as this, where the purpose of the exemption is to lessen the effect that governmental actions will have on religious institutions, the Court should compare the alternative approaches available to decide which approach pro-

duces "effects" which are least likely to advance *or hinder* religion. The district court found that the exemption in Section 702 advanced religion, but it disregarded the fact that its redefined exemption for "religious" activities will seriously hinder religion by interfering with church beliefs and doctrines and religious autonomy. Thus, the district court ignored the language in *Lemon* prohibiting primary effects which inhibit religion. If the district court had paid equal respect to all facets of *Lemon*'s effects test, it would have attempted to analyze the degree to which the broader exemption in Section 702 "advances" religion and compared that to the hindrance of religion caused by an exemption limited to "religious" activities.[42] Only in that way could the court properly determine whether the primary effect of Congress' action was to advance or hinder religion. Under that standard, Section 702 does not offend the Establishment Clause.

Appellants' previous analyses have largely explained the basis for the argument here. First, it is clear that the "effect" of the exemption on religion, even if it "primarily advances" religion, is very limited. See pp. 39-41, *supra*. By contrast, the amount of government entanglement and interference with Mormon religious beliefs and practices under the district court's analysis is substantial. See pp. 34-37, *supra*. While it is true that the Court has eschewed balancing tests under the Establishment Clause in cases involving direct government aid to religious institutions, such an approach would seem to be self-defeating here. The purpose of the effects inquiry is to determine whether a law enacted

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[42] In the context of this case, the "hindrance" of religion test and the "entanglement" test in *Lemon* overlap substantially. Thus, the comparison can be stated alternatively as being between the advancement of religion produced by granting a complete exemption of religious activities and the governmental entanglement created by providing a limited religious exemption. Under either label the ultimate inquiry remains which approach best serves the underlying purposes of the Establishment Clause.

by Congress tends to establish religion. If one facet of the *Lemon* test would be seriously violated by striking down a statute under a wooden application of another portion, the ultimate result will not promote religious freedom.

When a comparison between an exemption and a non-exemption leads to equipoise, or near equipoise, then, at least in a situation such as this one, where the legislature is genuinely seeking to advance constitutional values, deference to the legislative judgment as to how to proceed is appropriate. See *Gillette* v. *United States*, 401 U.S. at 460. Accordingly, in this unique situation, the Court should permit a limited comparative analysis in order to advance the purpose of the First Amendment.[43] If it does, then Section 702 is clearly constitutional.

II. THE DISTRICT COURT ERRED IN AWARDING BACK PAY AGAINST A CHURCH EMPLOYER THAT RELIED ON THE CLEAR LANGUAGE OF CONGRESS.

Even if, contrary to our submission in Part I, Section 702 is unconstitutional, the district court's award of back pay—and, indeed, its finding of any liability in this case—was nevertheless improper. Appellant's good faith reliance on the clear language of the Section 702 exemption should preclude an award of back pay against appellants. This conclusion is strongly supported by Congress' express determination that "no person shall be subject to

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[43] The Court in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 783-785 n.39 (1973), held that there is no room for a comparative analysis of secular effects and religious effects of a statute which advances religon. But that inquiry, which the Court described as a "metaphysical judgment" because of the disparate nature of the things being compared, is fundamentally different from the one proposed here. Nothing in the Establishment Clause requires the Court to give preeminence to effects which promote religion and ignore those which hinder it or to favor the primary effects prong of *Lemon* if to do so will undermine equally important values embodied in the entanglement prong. Some comparison is clearly required.

any liability or punishment for or on account of . . . an unlawful employment practice . . . [undertaken] in conformity with and in reliance on any written interpretation or opinion of the [EEOC] . . . notwithstanding that . . . such interpretation or opinion is . . . determined by judicial authority to be invalid or of no legal effect . . . ." 42 U.S.C. § 2000e-12(b). Thus, Congress plainly evinced its intent to preclude the imposition of "any liability or punishment" under Title VII on any person who in good faith implemented an employment practice in reliance on a regulation or opinion of the EEOC. It follows, *a fortiori*, that Congress did not intend back pay to be awarded against a party which in good faith relied upon the clear language of a statutory exemption enacted by the Congress itself.

The district court, in a two sentence footnote, held this provision to be of no relevance here because appellants did not rely upon a written opinion of the EEOC. The court's cavalier disregard of Congress' intent leads to a patently absurd result. The court implicitly assumes that Congress intended to give more weight to the EEOC's interpretation of Title VII than to the language Congress itself used in enacting that statute. Had any of the appellees ever challenged the Church's employment practices before the EEOC, the Commission would have been bound by Section 702 to deny all relief, and the Church would—without question—now be free of any liability for its policy of hiring only those persons who are eligible for temple recommends. Congress simply could not have intended to permit an award of back pay against a party that implemented an employment practice in good faith reliance on a Congressional exemption.

Equitable relief, including back pay, is authorized—although not mandatory—under Title VII, 42 U.S.C. § 2000e-5(g). The district court acknowledged that "legislative acts are presumed to be constitutional" (J.S. App. 118a), that appellants were wholly "justified in relying on the section 702 exemption" (*id.* at 118a n. 17),

and that "denial of back pay in this instance would probably not frustrate the central statutory purpose of eradicating discrimination throughout the economy" (*id.* at 119a). Notwithstanding these findings, the district court, relying primarily on this Court's decision in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), awarded Mr. Mayson back pay. J.S. App. 116a-120a. The court held that a denial of such relief would "frustrate the Act's purpose of making Frank Mayson whole for his injuries incurred through Deseret's past discrimination." J.S. App. 119a.

The district court abused its discretion in awarding back pay. This Court has made clear in at least two decisions that the statutory goal of making persons whole for injuries suffered from unlawful employment discrimination does not necessarily control the decision whether equitable relief is appropriate.

In *City of Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702 (1978), this Court considered a pension plan that was alleged to have violated Title VII. The plan called for female employees to make greater contributions than male employees. In holding that the pension plan violated Title VII, this Court refused to apply its decision retroactively. The Court noted:

> [a]lthough we now have no doubt about the application of the statute in this case, we must recognize that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department's was entirely lawful. The courts had been silent on the question, and the administrative agencies had conflicting views.

435 U.S. at 719-720.

Similarly, in *Arizona Governing Committee For Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U.S. 1073 (1983) (per curiam), this Court

considered whether *Manhart* should apply to discriminatory pension plans made available by an employer and run by outside companies. The Court ruled that this practice was illegal under *Manhart*, but again applied its decision prospectively only, holding that the benefits to be received from contributions made to the plans prior to *Manhart* may be calculated on the basis of the old standards. *Id.*[44]

In at least one significant respect, the case here for denial of retroactive relief is even stronger than in either *Manhart* or *Arizona Governing Committee*. The Church not only "may well have assumed" its employment policies complied with Title VII, *Manhart*, 435 U.S. at 720, but, indeed, implemented a practice *clearly permitted* by that Act. In sum, it was an abuse of discretion for the district court to hold that imposition of liability for back pay would serve Congress' "purposes" in enacting Title VII, when Congress itself clearly stated that the Act should not apply to the circumstances of this case.

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[44] The considerations that motivated the Court to apply its holding prospectively in *Manhart* also motivated the Court in *Arizona Governing Committee*. *See* 463 U.S. at 1106 (since *Manhart* did not apply to purchases on the open market, "an employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market") (opinion of Powell, J.).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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